



GARY R. HERBERT  
*Governor*  
GREG BELL  
*Lieutenant Governor*

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

### Division of Water Rights

MICHAEL R. STYLER  
*Executive Director*

KENT L. JONES  
*State Engineer/Division Director*

February 22, 2013

Dear Interested Party:

RE: Permanent Change Application Number 57-7800 (a28548)

Please find enclosed supplemental document(s) relating to the above numbered application.

All documents concerning this application will become a permanent part of this file and used in the decision making process.

Sincerely,

Kent L. Jones, P.E.,  
State Engineer

KLJ: sc

Enclosure:

cc: To all interested parties listed on file with the State Engineer's office.

Sandy City  
c/o Patrick R. Casaday  
10000 Centennial Parkway  
Salt Lake City, UT 84111

Alta Energy LLC  
c/o Bill Lennon  
PO Box 8101  
Alta, UT 84092-8101

USA Forest Service  
c/o Jeanne A. Evenden  
324 25th Street  
Ogden, UT 84401

Friends of Alta  
c/o Patrick A. Shea  
252 South 300 East, Ste A  
Salt Lake City, UT 84102

LETTER OF RESPONSE

Permanent Change Application Number

57-7800 (a28548)

February 22, 2013

Little Cottonwood Creek Distribution  
Committee  
c/o Sam Moore  
7973 Willow Circle  
Sandy, UT 84093

Salt Lake City Corporation  
c/o Shawn E. Draney  
PO Box 45000  
Salt Lake City, UT 84145-5000

Metropolitan Water District of Salt Lake &  
Sandy  
c/o Scott H. Martin  
PO Box 45000  
Salt Lake City, UT 84145-5000

Alta Ski Lifts Company  
c/o Jeffery W. Appel  
PO Box 45385

Little Cottonwood Creek Distribution  
Committee  
C/o Jeff Niermeyer  
1530 South West Temple  
Salt Lake City, UT 84115

Salt Lake City, UT 84145-0385  
Alta Ski Lifts Company  
c/o Onno Wieringa  
PO Box 8007  
Alta, UT 84092

Sandy Irrigation Company  
c/o John H. Mabey, Jr.  
175 South Main Street, Suite 1330  
Salt Lake City, UT 84111

Town of Alta  
c/o Lee Kapaloski  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111

Salt Lake County Service Area #3  
c/o David J. Smith  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111

Tim O'Hara, Co-River Commissioner  
1501 South 500 East  
Salt Lake City, UT 84015

Max Reese, Co-River Commissioner  
Tanner Ditch  
977 East 5600 South  
Salt Lake City, UT 84121



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## Tolton change application and test well permit

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**Teresa Wilhelmsen** <teresawilhelmsen@utah.gov>

Fri, Feb 22, 2013 at 2:16 PM

To: kevin tolton <kevintolton7@gmail.com>

Cc: boydclayton <boydclayton@utah.gov>, John Mann <johnmann@utah.gov>, kentljones <kentljones@utah.gov>, Mike Styler <mikestyler@utah.gov>, Julie Valdes <jvaldes@utah.gov>, Norman Johnson <normanjohnson@utah.gov>

Kevin,

Your test well application was mailed to you on February 20, 2013. You should receive that in the mail. If you do not receive it, let me know and we can mail another copy. It was mailed to the address on your test well application.

You requested an extension to March 30, 2013, to respond to the information in the requests for reconsideration. That extension request is granted. I did mention to you while you were in my office that I was preparing letters to you and others that will be seeking additional information and clarification to some questions that were raised. In those letters I will request that the additional information be provided within 30-days from the date of the letter. That should be generally consistent with your request to reply by March 30, 2013.

It is routine business for me to address questions regarding water rights. The issue of including all parties when discussing the merits of an application applies when there are other adjudicative parties to the application and the application is pending in our office. Basically all information used as a basis for our decision is shared equally with all parties to the application and all parties have the chance to respond to what each other party communicates to the State Engineer's office.

In regard to your question regarding my interaction with Mr. Draney, as we met I did express to you that I work well with Mr. Draney. He has many clients in my regional area and I interact with him regularly. I do feel he and I have a good professional relationship. Regarding change application a28548, just as you did, Mr. Draney contacted my office after the Order of the State Engineer was issued. He asked to clarify the flow and segregation amounts shown on our database for Water Right 57-7800. At that time, our discussions with you, or others, were not documented because the discussions were to clarify the issued order. Once a reconsideration is granted, the change application was again under review by the State Engineer. You and I met after that and discussed specific merits of the application, hence the need to document the meeting I had with you.

To my recollection I have not discussed the merits of your application separately with any other parties or their attorneys, including Mr. Wright, while it was or has been under review with the State Engineer's office.

If you have general questions regarding your water rights, general water right questions, or you have questions on other applications you may consider filing, I encourage you to contact me. While change application a28548 is under review, we do need to ensure conversations on the merits of the application be shared equally with all

parties. For this reason, I will place this email on the water right file and send copies to the other parties.

Sincerely,

Teresa

On Thu, Feb 21, 2013 at 8:01 PM, kevin tolton <kevintolton7@gmail.com> wrote:  
Teresa,

This letter is to follow up on your letter sent to me on February 13, 2013 regarding our meeting in your office February 6, 2013.

Thank you for the time spent in reviewing some of the State Engineer's Office's water right calculations on my approved change application for WR 57-7800 a28548 which has now been put on hold under a reconsideration order. As we discussed, part of the reason for granting the reconsideration is to allow the State Engineer to review and reassess the numerical calculations which were relied upon in the change application approval dated January 3, 2013.

I appreciated the certified copies of the file documents on my water rights 57-9001, 57-7800 and 57-9013. As we discussed, the surplus water rights for Little Cottonwood Creek flows in excess of 94.79 CFS under the Morse Decree now have a water right number 57-9013 and under your analysis will require a separate change application filing with your office as well as a separate change application filing for the remainder of 57-9001 once the 57-7800 portion that is currently the subject of this change application process gets approved for a new point of diversion. You also stated that I would have to file a different change application to move water I am entitled to use at Alta under a contract with the Little Cottonwood Water Company which contracts are apparently under the direct control of SLC subject to the legal conditions of the wind down agreement when SLC took over the company and its assets.

Another one of the topics we discussed briefly at our meeting and which you mentioned in your February 13, 2013 letter was the idea of me drilling a test well since my current well drilling permit under the Decision Memo approval has been temporarily rescinded. As you recall, John Mann previously granted me a test well permit on April 9, 2009, Test Well #: 0957006M00 which has lapsed (for my same lot in Albion Basin). On February 6, 2013 I submitted a new application so that in spite of the Change Application 57-7800 a28548 being under review, I could proceed in order to test the suitability of the site for well water production since only a single point of diversion was granted for a well site on my Alta property. If the well hole is dry, then my entire change application Memo Decision will need to be rethought and amended by the State Engineer resulting in unnecessary costs and delays. There is no scientific downside in re-approving a test well. As you and Mr. Mann have assured me, despite the "great deal of interest from outside parties in my application", that my "change application approval process from the point of view of the State Engineer is not political".

In the interest of efficiency and to perfect my application, I find it a reasonable plan to move ahead. I am aware that, as is customary under a test well permit, that I cannot legally divert water unless and until my change application is formally approved. I can, however, measure the well water flows once a hole is drilled. Moreover, there is an advantage to drilling in the winter time because now has the least environmental impact. Transporting a 50,000 pound drilling rig over the snow will have no impact along the travel route to flora and fauna unlike in the summer.

My test well permit application is now past due for a formal decision and I would respectfully ask that you and Kent Jones approve the test well permit as soon as possible. I have secured an excavation permit from the Town of Alta dated January 11, 2013 (which has a time limit to it) and I have also discussed the safety considerations regarding transporting the drilling equipment to my building lot with Onno Wieringa, Alta Ski Lift General Manager, so as to mitigate skier safety concerns. In addition, I have applied to the Forest Service for a special use permit even though the Forest Service lacks the legal authority to regulate my travel on a State Road (i.e. SR 210), which road is also encumbered with my ingress and egress rights stemming from patent, RS 2477 rights of way and other legal easement rights. All of this has been feasible to do and I have made a good faith effort to comply with putting my water right to beneficial use as soon as is/was practicable.

Please recall that during our meeting we also discussed the favorable (but unequal) treatment the State Engineer's Office has given SLC historically on many already approved change applications in Big and Little Cottonwood Canyons. In multiple instances the State Engineer has approved water transfers for SLC applying little or no depletion penalties. The Dr. Hill study, which was published in 1994, and which you cited in our meeting was, in fact, the final 1994 Hill report and therefore the data was known well in advance of SLC obtaining a 50% depletion calculus on its Canyonlands contract for 35 homes in Albion Basin (see WR 57-10015 a16846 where 15.75 acre feet was depleted down to 7.875 AF, a 50% depletion standard, whereas, in my application irrigable lands received 42.4% depletion). That SLC transfer was based on a Cahoon Maxfield water right used below the treatment plant. My water was historically used above the treatment plant, accordingly, my depletion should be the same or more (that's assuming a depletion penalty is even applicable to my water right transfer). If the State Engineer has made a mistake worthy of reconsideration then he should go back and correct the SLC water applications so that decisions are not arbitrary and capricious. The State Engineer should apply the same principles and calculations to my application as it has to SLC's. He has a legal duty of fairness in his application of calculations, standards and the law.

Additionally, you had asked me if I needed more time to respond to Mr. Draney's memorandum. I would like an additional 30 days to respond so that my response would be due 60 days after the Request for Reconsideration was granted namely on or about March 30, 2013. In my response I will address many of SLC's allegations and objections including estoppel and res judicata arguments wherein SLC is on the record advocating positions for themselves which patently contradict those they are now taking against me. As Mr. Draney points out in his

memorandum, "Under judicial estoppel. a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained." *Cafe Rio, Inc. v. Larkin-Gifford-Overton, Inc.*, 2009 UT 27, 42, 207 P. 3d 1235, 1243; and Mr. Draney cites: *Nye v. Bacon*, 18 P.2d 289, 291 (Utah 1933) "Utah Courts had long held that parties who make statements in pleadings, seeking relief, are estopped from denying those statements when such relief is granted".

Privity is established by SLC and Sandy suing me for my water right 57-7800 under the Quiet Title statutes and for seeking adjudication by filing a Joint Petition for Interlocutory Decree under section 24 of the General Adjudication statute. Privity exists based upon owning competing water rights shared in the same basin and the interconnectedness of our water rights relative to hydrologic basins and based upon the possibilities of mutual interference as well as privity established by the bounds and conditions imposed on SLC and myself relative to the Morse Decree, Iverson Decree and relevant binding contract provisions. SLC is clearly estopped from taking positions contrary to those made in prior legal proceedings. I plan on providing substantial evidence of unfair and unequal treatment with respect to my application when compared with SLC approvals granted by the State Engineer. There are also numerous errors in Mr. Draney's logic and argument which will need to be properly addressed in my response which will require additional time. Again citing Mr. Draney's Request for Reconsideration Memorandum, "The State Engineer is not not tasked with ducking the job of proper distribution of water". It is interesting and revealing that Mr. Draney states on page 7 of his response essentially that historic depletion is not necessarily applied to all water rights. Certainly, SLC has benefitted from taking the position that prior State Engineer approvals of SLC water transfers are proper when no depletion calculation penalties were applied, allowing them to move up canyon the full amount of the original water right. I simply ask for the same treatment as SLC gets at the hands of the State Engineer's Office.

Lastly, you had mentioned that you have a great relationship with Mr. Draney. I wonder if you have had any conversations with Mr. Draney or Mr. Wright regarding the circumstances and details surrounding my Change Application or the Request for Reconsideration which in fairness should be disclosed to me in the same fashion that your detailed letter dated February 13, 2013 memorializes our discussions?

I appreciate the time and consideration you and your staff have devoted to this important application which has been held up by SLC and Sandy City for well over a decade in litigation and procedural delays. It is my intention to seek an expeditious and fair outcome.

Please let me know at your earliest convenience the test well application approval decision and the deadline for my response to Mr. Draney's memo as well as the other protestants of record.

Sincerely,

Kevin Tolton, M.D.

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Teresa Wilhelmsen, P.E.  
Regional Engineer - Utah Lake / Jordan River Region

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Division of Water Rights  
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801-538-7467 fax  
[teresawilhelmsen@utah.gov](mailto:teresawilhelmsen@utah.gov)

To the world you may be just one person, but to just one dog you may be the world!